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NO. 88-1102

Supreme Court, U.S.
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In the
Supreme Court of the United States
OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS.

Petitioners

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

RESPONDENTS BRIEF IN OPPOSITION

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RESPONDENT'S OPPOSITION

Respondent, Paul C. Mitchell, in his official capacity as Finance Director of the City of New Orleans, respectfully submits this brief in opposition to the petition for certiorari filed herein by Petitioners, Westminster Management

Corporation, et als. For the reasons offered below, Respondent submits that the requested writ of certiorari is not warranted, considering in the first instance that Petitioners' complaint of denial of due process of law was not timely raised below, nor passed upon by any Louisiana court. Accordingly, this Court is without jurisdiction to now consider such a claim. Further, Respondent submits that the court of appeal correctly denied Petitioners' relief below due to their failure to exhaust the administrative remedies required by law and that the dismissal on that ground constitutes an adequate and independent state procedural ground, such that review by this Court is precluded.

COUNTERSTATEMENT OF THE CASE

The questions as presented by Petitioners bear little relationship to the proceeding as constituted below.

Comparison of the federal question raised below, in contrast with that asserted here, is essential to an understanding of what federal rights are, and are not, at issue here, as well as what federal rights were, and were not, at issue in the court below.[1]

The Federal Question Presented Below

The Petitioners asserted below that their ad valorem property taxes for the year 1987 correctly reflected the true value of their property, but that the property of other taxpayers of the same class were incorrectly underassessed. If established, this claim gives rise to but one constitutional question: whether the alleged underassessment of other similarly

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[1]Clarification is also needed as to who is, and who is not, a Respondent. William J. Guste, Attorney General for the State of Louisiana is so named on the face of the Petition. He is not now, nor has he ever been, a party to this proceeding.

situated property owners constitutes a denial of equal protection of the laws in violation of the Louisiana and federal constitutions.

> The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 445-447, 43 S.Ct. 190, 191, 192, 67 L.Ed. 340, 28 A.L.R. 979; *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239, 247, 52 S.Ct. 133, 136, 76 L.Ed. 265; *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23, 29, 52 S.Ct. 48, 50, 76 L.Ed 146.

Hillsborough Township v. Cromwell, 326 U.S. 620, 623 (1946).

In furtherance of those principles, this Court has long held that "if both the standard of true value and the uniformity required by the law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City, supra.* A taxpayer under such circumstances must have available to him the remedy of reduction in his taxes, or the right to uniformity and equality guaranteed to him by the federal constitution will be deemed to have been violated.

In instances in which it was apparent that the state procedure or judiciary did not provide the remedy of reduction of taxes, but rather relegated the taxpayer solely to an action to increase the assessments of other taxpayers more favorably treated, this Court has not

hesitated to intervene to require the states to grant the taxpayer the constitutionally required remedy of reduction in order to assure "equality and uniformity . . . under the law." *Sioux City, supra; Hillsborough, supra.*

No Equal Protection Claim Is Asserted Here

However, this is not a case in which the litigants seek this Court's intervention to secure that relief. Petitioners freely acknowledge that Louisiana courts recognize this federally guaranteed remedy:

> Following the guidelines of *Yick Wo, Sunday Lake,* and *Sioux City,* Louisiana jurisprudence . . . has applied this concept in the context of determining the validity of ad valorem taxation. *Dixon v. Flournoy,* 176 So.2d 138 (La. 1965) citing *Soux City, et als,* in footnote p. 140); *Bussie v. Long,* 286 So.2d 689 (La. App. 1st Cir. 1974); *Probst v. City of New Orleans,* 325 So.2d 665 (4th Cir. La. 1976).

Petition, p. 12. Petitioners then quote the opinion below for that proposition:

> The following is language of the court below recognizing the Louisiana position:
>
> We make no argument with plaintiffs' foundational principle that "if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City Bridge Company v. Dakota County, Neb.*, 260 U. S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Probst v. City of New Orleans*, 337 So.2d 1081 (La. 1976); *Bussie v. Long*, 286 So.2d 689 (La. App. 1st Cir. 1973), writ denied, 288 So.2d 354 (La. 1974).
>
> *Westminster Management Corp. v. Mitchell*, 525 So.2d 1171, 1173 (La. App. 4th Cir. 1988).

Petition, p. 12.

In fact, earlier decisions in this very case reveal that the state stood ready to apply the federal remedy of reduction. In the course of its observation that Petitioners were not permitted to place their entire tax liability at issue (and thus that some of the funds escrowed were "not

in dispute" and had to be released), the trial court observed:

> [I]t is more likely than not that if the taxpayers prevail, their ad valorem tax liability for 1987 will not be less than . . . the amount of their 1986 ad valorem taxes.
>
> The City of New Orleans is not insolvent. **Should the taxpayers secure a judgment higher than their cumulative 1986 taxes, the City has the present and future ability to satisfy the judgment.**

Trial court decision in escrow dispute; Respondent's Appendix B-10,11 (emphasis supplied). The Fourth Circuit Court of Appeals reversed[2], but the Louisiana Supreme Court granted Writs and reinstated the trial court judgment "for

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[2]Incredibly, Petitioners have reproduced the Fourth Circuit opinion in the escrow dispute in full, and quote it at length. Petitioners then have the audacity to criticize the later Fourth Circuit decision for "[i]gnoring its opinion in the first Westminster case . . ." Pet. p. 17. In view of the fact the Supreme Court of Louisiana "reversed and vacated" that opinion, the Fourth Circuit would have been derelict had it followed it.

the reasons assigned by the district judge."

Plainly no Louisiana court would impose upon Petitioners the impermissible burden of forcing the assessments of other taxpayers to be increased. Rather, as the court's reference to a monetary judgment makes clear, Louisiana will apply the federal remedy in cases that properly assert it.

Petitioners are therefore correct that this case is "[u]nlike the West Virginia cases," recently decided by this Court. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County* (Docket No. 87-1303) c/w *East Kentucky Energy Corp. v. County Commissioner of Webster County* (Docket No. 87-1310, 57 L.W. 4095, _____ U.S. _____ (Jan. 18, 1989). (In *Allegheny* this Court reversed a state court decision which relegated taxpayers to the remedy of having other taxpayers' assessments

increased.) By Petitioners' own admission, the courts of Louisiana will enforce the federally required remedy of reduction in taxes where it is made to appear that "both the standard of true value and the uniformity and equality required by the law cannot be achieved." This was the only federal question presented by the pleadings below. Petitioners have here acknowledged, and indeed cannot dispute, that the federal remedy was available to them.

The State Court Action

Although the federal remedy of reduction was available to these taxpayers, the appellate court did not reach the federal question. The suits were dismissed based on the taxpayers' failure to follow the procedures mandated by Article VII, Section 18(E) of the Louisiana Constitution of 1974, as implemented by La. R.S.

47:1989 - 1998, requiring exhaustion of administrative remedies and timely institution of a suit for judicial review thereafter.

The federal question that logically flows from the holding below is whether the Louisiana court of appeal's[3] dismissal for failure to timely comply with required Louisiana procedures constitutes an "adequate and independent state" ground, such that the court was justified in not reaching the federal question of equal protection. *Michigan v. Tyler,* 436 U.S. 499, 512 n7 (1978); *New York Times v. Sullivan,* 376 U.S. 254, 264 n4 (1964).

Generally, "[a] taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct

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[3]*Westminster Management Corp. v. Mitchell,* 525 So.2d 1171 (La. App. 4th Cir. 1988), *writ denied* 532 So.2d 132 (La. 1988).

assessment of a tax cannot thereafter be heard by a judicial tribunal to assert its invalidity."[4] When state courts decline to reach a federal question for this reason, this Court will ordinarily decline jurisdiction for lack of a federal question. *See Gorham, supra* and cases cited therein; *McCoy v. Shaw,* 277 U.S. 302 (1928). In apparent recognition of this obstacle to invocation of this Court's jurisdiction, Petitioners here discard the mantel of equal protection in favor of a cloak of due process.

The Federal Question Here

It is difficult to respond to the questions as presented, due to the fact that Petitioners apply standards that have little bearing on the issue of whether this

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[4]*Gorham Manufacturing Co. v. State Tax Commission of New York,* 266 U.S. 265, 269, 270 (1924)

Court has jurisdiction to accept this case for review.[5] The difficulty is compounded by Petitioners' omissions and misstatements of the Louisiana law advanced in support of their argument.

It appears, however, that the gravamen of their complaint before this Court is that the dismissal of the petitions below based on Petitioners' failure to comply with state procedures required as a condition precedent to assert their challenge, denied them due process of law. If Respondent understands the argument, it

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[5]For example, at page 10, Petitioners query whether the Louisiana court has "met the constitutional mandate to provide a 'plain, adequate and complete' remedy to its taxpayers." No citation of authority is provided for the suggestion that there is such a constitutional mandate. Indeed, Petitioners appear to have lifted that language, at least partially, from 28 USC § 1341 which restrains federal district courts from interfering with the "assessment of . . . any tax under State law where a plain, speedy and efficient remedy" is had in the courts of the state.

is that their lawsuits should not have been dismissed on that ground, because Petitioners did not know that the procedural rule was applicable to them. This is but the thinnest of reeds, for a long line of Louisiana jurisprudence has required timely exhaustion of administrative remedies in instances in which a taxpayer challenges the "correctness" and legality of his assessment.

Assuming this characterization of Petitioners' argument is correct, two questions are presented. First, can Petitioners be excused from their failure to timely raise the due process question in either the trial or appellate court? And second, on the facts and law presented, can Petitioners actually demonstrate that their due process rights were affected? Both questions must be answered in the

negative. The petition is due to be dismissed for lack of jurisdiction.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. THIS COURT HAS NO JURISDICTION BECAUSE THE QUESTION WAS NOT TIMELY RAISED BELOW.

Petitioners assert that this Court's jurisdiction is premised on 28 USC § 1257(3), presumably on the ground that a "title, right, privilege or immunity is specially set up or claimed under the Constitution of . . . the United States." However, neither Respondent nor this Court should be required to guess at the jurisdictional provision, for the law is well settled that the Petitioner bears the burden of affirmatively establishing this Court's jurisdiction. *See e.g., Street v. State of New York,* 394 U.S. 576 (1969). Petitioners have not met this burden.

The Petition Does Not Allege Any Facts In Support of This Court's Jurisdiction

Pursuant to Supreme Court Rule 21(h) Petitioners were required to ". . . specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised . . .," including "the method or manner of raising them and the way in which they were passed upon by the court. . . with specific reference to the places in the record where the matter appears . . ." These specifics are all required to "show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The Petition before this Court contains no such specific jurisdictional allegations; indeed it contains no general ones. As one familiar with the record, Respondent suggests that their absence is due to Petitioners' inability to establish them. The Petition is therefore facially defective with respect to this Court's jurisdiction and is due to be dismissed on that ground alone.

The Issue Was Not Raised At Petitioners' First Opportunity

"It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 86 n.9. (1980). The only exception to this rule is "in circumstances in which the litigant could not "reasonably . . .

anticipate" that a state court decision would adversely affect constitutionally guaranteed rights, or if the state court has rendered an "unexpected interpretation of state law" or has "reversed its prior interpretation." *See e.g. Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930); *Saunders v. Shaw,* 244 U.S. 317, 320 (1917).

Under such circumstances, a litigant's failure to raise the federal question may be excused if he invokes "the protection of the Federal Constitution . . . " at his "first opportunity" to do so. *Pruneyard Shopping Center, supra.* The record below reveals that Petitioners missed many opportunities to raise the due process

issue presented here.[6] Accordingly, it comes too late for this Court to have jurisdiction to consider it.

The pleadings filed by Respondent in both the trial and appellate court urged that the petitions should be dismissed for the reason that the remedy set forth in La. R.S. 47:1998 was exclusive. Thus Petitioners were fully aware of the consequence - i.e., dismissal - that would ensue in the event a court were to apply the law as urged by Respondent. But the alleged deprivation of due process about which Petitioners now complain is precisely that their petitions were

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[6]The petitioners below claimed that their *tax assessments* violated both due process and equal protection. Actually, however, it is clear from their pleadings that the claim below did not involve due process, but only equal protection. In any event, that clearly is not the "due process" denial that Petitioners bring to this Court; here their complaint is not with the tax assessment, but with their opportunity to be heard in connection with that assessment.

dismissed. The due process question was thus staring Petitioners in the face, yet they did not present it to either the trial or the appellate court.

Even if for some reason, the Petitioners could convince the Court that they could not have "reasonably anticipated" that construction at the trial court level, so as to excuse their failure to raise it there, then surely the fact that discretionary writs were granted by the appellate court should have alerted Petitioners to raise the issue presented here - i.e. that under the circumstances, dismissal of their lawsuits would deprive them of due process. And if the granting of the writ did not alert the Petitioners to the due process argument, then the decision of that court which actually dismissed their petitions most certainly should have.

Assuming *arguendo,* that the decision of the appellate court was "unexpected," the Petitioners were then required to invoke the constitutional protection at their "first opportunity" thereafter. But Petitioners failed to do so, even in their timely filed Application for Rehearing before the court of appeal. Petitioners offer no justification, nor is there any, for their failure to raise the question in that rehearing application. Thus, even according a construction most favorable to them, Petitioners failed to assert the question at their "first opportunity" and have lost the right to assert it here.

The result here should be the same as in *Wilson v. Cook,* 327 U.S. 474, 485 (1946) wherein this Court declined to review a challenge to a tax arising under the Fourteenth Amendment that was not

raised, even on rehearing, with the comment:

> Even if the opinion of the Supreme Court of Arkansas had proceeded on a ground so unexpected as to make timely by petition for rehearing, the raising of the federal question now for the first time advanced . . . Petitioners in their petition for rehearing did not suggest them.

Only in Application for discretionary Writs of Certiorari to the Louisiana Supreme Court was the issue feebly advanced. The Louisiana Supreme Court denied writs. In Louisiana, review by the Louisiana Supreme Court is discretionary;[7] moreover, Louisiana law is well settled

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[7]The fact that review in the Louisiana Supreme Court is discretionary suggests another deficiency in the Petition. The Louisiana Supreme Court's denial of writs does not constitute a decision on the merits of the case. The petition for writ of certiorari should have been directed to the Fourth Circuit Court of Appeal, not the Supreme Court. *See: Faretta v. California*, 422 U.S. 806, 812 (1975); *Callender v. Florida*, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

that the Supreme Court will not consider questions not timely raised and preserved for review below. *See e.g. Shally v. New Orleans Public Service,* 159 La. 519, 105 So.606 (1925); *Lemire v. New Orleans Public Service,* 458 So.2d 1308, 1311 (La. 1984). This is, of itself, an "independent and adequate state ground" for the Louisiana Supreme Court's refusal to consider the due process question. *Michigan v. Tyler, supra.*

The Petitioners had the opportunity to raise and litigate below, in both the trial and appellate courts, the question of whether the alleged construction of the state procedures urged by Respondent would result in a deprivation of their due process right to be heard. They did not timely assert it. The due process argument comes too late to preserve this Court's jurisdiction to consider it.

2. THIS COURT LACKS JURISDICTION TO CONSIDER THIS CLAIM, BECAUSE THE CASE BELOW WAS DECIDED ON AN INDEPENDENT AND ADEQUATE STATE GROUND

The Claim

Even assuming that the federal due process question is properly before this Court, it has no merit. The substance of Petitioners' complaint seems to be that the court of appeal below relied on *Lowrey v. Chevrolet, Inc. v. Brumley,* 510 So.2d 1294 (La.App. 3rd Cir. 1976) *writ denied* 514 So.2d 20 (La. 1987), a case decided after their suits had already been filed pursuant to La. R.S. 47:2110. Petitioners suggest that until *Lowrey* was decided, they did not know that they were required to comply exclusively with the procedures established in La. R.S. 47:1998, which requires exhaustion of administrative remedies when a taxpayer challenges the "correctness" of his assessment.

Relying on *Chevron v. Huson*[8] and its progeny, Petitioners now claim that *Lowrey* was "retroactively" applied to them to their detriment. They claim that the rule announced in *Lowrey* was "not reasonably foreseeable under the then existing statutory scheme or jurisprudence," and that a "hypertechnical procedural error" was invoked to deny them a hearing on the merits of the case. None of these allegations are supported or supportable when viewed in the light of Louisiana law as it existed when the Petitioners filed their suits.

Again, it is necessary to start with the general principle that this Court does

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[8]404 U.S. 97 (1971). Strictly speaking, *Chevron* and the other cases cited by Petitioners are not due process cases, although some of the factors enunciated in *Chevron* are similar to those which guide the Court in considering whether a state court decision has denied a litigant due process.

not have jurisdiction to review a state court decision decided on an "independent and adequate" state procedural ground. Despite their clamor to the contrary, Petitioners cannot demonstrate that their remedy below was "speculative" or "uncertain" so as to invoke this Court's jurisdiction. Similarly, they cannot show that the court of appeals' decision was "unexpected" or that they could not have "reasonably anticipated" the result below.[9]

The Decision Below Was Not Unexpected

Petitioners asserted below, and here, that theirs was not a "correctness" challenge, but rather a challenge to the "legality" of the tax, and that they were entitled to proceed under the "alternative" procedure in La. R.S. 47:2110. As to the

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[9]*See e.g. Pruneyard Shopping Center, supra.*

"correctness" *versus* "legality" distinction the Louisiana Fourth Circuit correctly held:

> We find, however that plaintiffs incorrectly construe this and other "constitutional" principles to argue that their challenge is not for "correctness." "Correctness" includes both the standard of true value and the uniformity and equality required by law. The achievement of both is the goal, the absence of either creates incorrectness. That uniformity and equality are given higher priority than true value does not make an attack on the former rather than the latter something other than a challenge for "correctness."

Petitioners' Appendix, p. A-45, 46.[10] The court of appeal then held:

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[10]It is not the province of this Court to review the validity *vel non,* of that substantive interpretation of Louisiana law. Even if it was incorrect, "it is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." *American Railway Express Co. v. Commonwealth of Kentucky,* 273 U.S. 269, 273 (1927).

> Because the Louisiana Constitution of 1974 mandates the procedures for "correctness" challenges, La. R.S. 47:2110, to the extent its direct action provisions conflict with the Constitution must apply only to non-correctness challenges. *Lowrey* *** *Capital Drilling Company v. Graves,* 496 So.2d 487 (La. App. 1st Cir. 1986)

Westminster, supra; Petitioners' Appendix, page A-45.

It is only through the use of certain affirmative misstatements of the law that Petitioners are able to muster any support for their untimely claim that the decision below deprived them of due process. Petitioners assert that:

> "[u]ntil a point in time (the decision in *Lowrey*) which occurred after this suit was filed, there appeared to be available . . . two roads to the judicial determination of both the correctness and legality of their ad valorem taxes . . .,"

either La. R.S. 47:1998 or La. R.S.

47:2110. At page 21, Petitioners make the astonishing assertion that:

> It was not until *Lowrey* that any court had held that the exclusive remedy for "correctness" was an appeal from the Louisiana Tax Commission decision . . .

Contrary to these sweeping and erroneous characterizations, Louisiana law has long recognized a distinction between the procedures that must be followed by a taxpayer in challenges involving the "correctness" and legality of a tax, as opposed to challenges solely involving the "legality" of a tax. Long before *Lowrey*, Louisiana courts had held that a suit for refund of taxes paid under protest alleging as its basis lack of uniformity of assessments did not challenge the "legality" of the tax or the "method of its enforcement," as envisioned by La. R.S. 47:2110, but rather the "correctness" of

the underlying assessments pursuant to La. R.S. 47: 1998. In cases involving the "correctness" of assessments, Louisiana courts have indeed previously held that taxpayers must first exhaust administrative remedies.[11]

The issue was discussed and resolved by the Louisiana Supreme Court over twenty years ago in *Dixon v. Flournoy,* 176 So.2d 138 (La. 1965). There, petitioners filed suit under La. R.S. 47:2110 for refund of taxes paid under protest, alleging discrimination based upon assessment of their properties at an average ratio higher than the state-wide average. The plaintiffs invoked La. R.S.

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[11]This Court has recognized and it is beyond peradventure that the state has a legitimate procedural interest in imposing the requirement of exhaustion of administrative remedies in tax cases. *See: Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931); *Gorham Manufacturing, supra* and cases cited therein.

47:2110 as the basis of their suit, and the Court dismissed their complaint for failure to comply with the exclusive requirements of 47:1998, which at that time was available to any taxpayer wishing to test the "correctness or legality of any assessment made against property" belonging to him.

In response to the argument that the plaintiffs did not attack the correctness or legality of the assessments of the tax against them pursuant to Section 1998, but rather launched an attack against the tax itself by alleging non-uniform assessments pursuant to Section 2110, the Court observed the following:

> While the ultimate object of the plaintiffs' suit is to have the property tax as applied to them declared unconstitutional, this object is dependent upon their being able to prove that the assessment upon which the tax is based is incorrect and illegal. Their real complaint,

> **therefore, is not the tax as distinguished from the assessment, but is that their assessments are incorrect and illegal; and a suit which has as one of its objects to contest the correctness or legality of an assessment must satisfy the conditions of the second paragraph of R.S. 47:1998.**

176 So.2d at 142 (emphasis added).

The decision below is not "diametrically different from prior Louisiana Supreme Court" decisions, as Petitioners assert at page 20, for the court below clearly applied the same rule of law enunciated twenty years before in *Dixon v. Flournoy*. Nor is it true that "it was not until *Lowrey* that any court had held that the exclusive remedy for 'correctness' was an appeal from the Louisiana Tax Commission." Petition, p. 21. *Dixon* had clearly done so.[12]

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[12]Interestingly the United States Fifth Circuit Court of Appeal reviewed the procedures established

The Effect of Article VII § 18(E) of the Louisiana Constitution of 1974

It is against this historical perspective that Petitioners reliance on *Churchill Farms, Inc. v. Louisiana Tax Commission,* 338 So.2d 963 (La. App. 4th Cir. 1976) and *Giraud v. City of New Orleans,* 359 So.2d 294 (La. App. 4th Cir. 1975), must be judged. These are the cases cited by Petitioners in support of their conclusion that those decisions announce the only "consistent" interpretations of the statutory provisions. Petition, p. 23.

In *Churchill Farms,* the plaintiffs sought refund of 1969 ad valorem taxes

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in *Dixon* against a challenge that the Louisiana scheme for judicial review of assessments was inadequate for a variety of reasons and found that those remedies were "plain, speedy and efficient within the contemplation of 28 USCA § 1341." *Bussie v. Long,* 254 F.Supp. 797 (E.D.La.) *aff'd* 383 F2d 766, 770 (1967).

paid under protest. The court noted that *Dixon v. Flournoy* limited La. R.S. 47:2110 to suits "questioning the constitutionality of the tax itself and not an unconstitutional administration of the assessment law,"[13] but found that *Dixon* was not controlling because a 1970 amendment to 47:2110(D) had legislatively overruled the Louisiana Supreme Court pronouncement in *Dixon*. *See* 338 So.2d at 966. The amendment to Section 2110(D) provided as follows:

> The right of action provided in this section shall be in addition to any rights elsewhere provided in this subtitle, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or correctness of their assessment or ad valorem taxes paid under protest before the courts of this state.

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[13] 338 So.2d at 965.

The court of appeal held that the 1970 revision, which added the phrase "including R.S. 47:1998," elevated 47:2110 to the status of an alternative remedy, "a separate right, in no way dependent on 47:1998." It is this provision and these cases on which Petitioners now rely.

However, while those decisions may have been an accurate statement of the law when they were decided, their continued vitality was ended with the adoption of the Louisiana Constitution of 1974. At that time, Article VII, Section 18(E) of that Louisiana Constitution gave constitutional dimension to the requirement of obtaining administrative review for all "correctness" challenges to ad valorem taxes, once again elevating the requirements of Section 1998 over those of Section 2110 and mandating administrative

review of all "correctness" challenges. Article VII, § 18(E) provides:

> The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.

This constitutional amendment had the effect of legislatively reinstating the rule of *Dixon v. Flournoy.*

This amendment did not take effect until 1978, however.[14] Thus, it could not have affected, and was properly not considered by the courts in, *Churchill Farms* or *Giraud.* By their own admission Petitioners "relied" on cases decided prior to the effective date of Article VII, Section 18(E). That reliance was not

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[14] *See* La. Const. 1974 Art. XIV § 13; *Giraud v. City of New Orleans,* 359 So.2d 295, 300 (La. App. 4th Cir. 1978).

reasonable and certainly provides no support for their due process claim.

After its effective date of January 1, 1978, Article VII, §18(E) of the Constitution of 1974 became the guiding light in the interpretation of both La. R.S. 47:1998 and 47:2110. It is axiomatic that a statute in conflict with a constitutional provision must fall. The court of appeal applied this fundamental principle when it held that with the advent of the 1974 Constitution, Section 2110 was available only to challenge "non-correctness" claims.

Between the time *Churchill Farms* and *Giraud* were decided and the time Petitioners filed suit, the law of Louisiana had changed. It is as simple as that. The decision of the court of appeal was not "unexpected" or "unsupported." *Dixon v. Flournoy* had years ago foretold the Petitioners that their claim was one of

"correctness," and the adoption of Article VII, Section 18(E) in the 1974 Constitution at least "foreshadowed," if not foretold, that La. R.S. 47:1998 was the exclusive constitutionally mandated means of challenging the "correctness" of their assessment.[15]

The Decision Was "Foreseen"

Moreover, contrary to the Petitioners' bald assertion that the result in *Lowrey*

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[15]The distinction between a challenge to the "correctness" and legality of an assessment on the one hand, and a challenge solely to the legality of an assessment, and a requirement of exhaustion for the former, is not unique to Louisiana law. Any complaint that such a distinction is "hypertechnical" is frivolous. *See: Parrent v. Fannin,* 616 S.W. 2d 501 (Ky. 1981); *Dennehy v. Department of Revenue,* 668 P2d 1210 (Or. 1983); *Felix v. Indiana Dept. of State Revenue,* 502 NE2d 119 (Ind. App. 1986). In fact, this Court dismissed for "lack of a substantial federal question" an appeal from a California court that decided issues virtually identical to the case at bar. *Westinghouse Electric Corp. v. Los Angeles County,* 42 Cal. App. 3d 32, 116 Cal. Rpt. 742 (1974) *appeal dismissed* 422 U.S. 1001 (1975). The dismissal of that appeal is to be given substantive effect and should control the outcome of this litigation.

was not foreseeable, it was actually foreseen by the Court in *Capital Drilling Co. v. Graves,*[16] decided before Petitioners filed suit:

> **Constitutionally, the *correctness of assessments by the assessor* must be appealed administratively first to the parish governing authority (board of review) and then to the Louisiana Tax Commission; thereafter, the assessment may be appealed judicially. La. Const. of 1974 art. VII §18(E); La. R.S. 47:1992; La. R.S. 47:1989; La. R.S. 47:1998. . . . Clearly, if La. R.S. 47:2110 conflicts with Article VII, §18(E), it is unconstitutional. Thus, La. R.S. 47:2110 must be construed as being applicable to only to *non-correctness* claims if it is to have validity.**

Capital Drilling, supra, at 492 n.2 (italics

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[16]496 So.2d 487 (La. App. 1st Cir. 1986).

by the court; additional emphasis added).[17]

Thus, this case does not:

> deal . . . with a situation where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar. *Barr v. City of Columbia,* 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766. This is not a case where a procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence. *Wright v. State of Georgia,* 373 U.S. 284, 291, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349.

Walker v. City of Birmingham, 388 U.S. 307, 319 (1967). Rather, *Dixon, Capital*

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[17]It is appalling that the Petition omits any reference to *Capital Drilling,* or the enactment of Article VII, § 18(E) of the 1974 Constitution. These authorities were clearly advanced in both the trial and appellate courts, and were specifically relied upon by the court of appeal. Petitioners failure to acknowledge the existence or effect of either of these salient legal facts, suggests that Petitioners understand that their disclosure operates to defeat their claim.

Drilling, and Article VII § 18(E) of the Constitution each provided "fair notice"[18] that La. R.S. 47:2110 was not available to Petitioners as an "alternative" to La. R.S. 47:1998.

Finally, it is apparent that the decision below did not "overrule any clear past precedent," as Petitioners claim, because the Louisiana Supreme Court did not have occasion to construe the statutes at issue after the effective date of Article VII, § 18(E). This does not mean that

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[18]Some Petitioners sought administrative review from the Tax Commission but did not thereafter timely seek judicial review. Their failure to do so is unexcusable in light of La. R.S. 47:1989, which provides in part: "All decisions by the tax commission are final unless appealed to the district court within thirty days." Moreover, each of these Petitioners received a letter from the Tax Commission, dutifully reproduced in Petitioners' Appendix (A-32), which advised "you have the right to appeal this decision to the district court within thirty (30) days of the date of this letter." If these explicit directives do not constitute "fair warning," it is difficult to imagine what does.

their remedy was so uncertain as to support the claim that they were denied due process; to the contrary, it should have alerted them to proceed with caution:

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.

Brinkerhoff-Faris, supra, at 682, n.9. Petitioners here assumed that risk, and must bear the consequences.

From 1970, when the Section 1998 "savings clause" was inserted in Section 2110(D), until January, 1978, when Article VII, Section 18(E) of the 1974 Constitution became effective, there was a procedural window during which a taxpayer could arguably attack the constitutionality of alleged non-uniformity of his assessment under either Section

2110 or Section 1998. With the January 1978 effective date of Article VII, Section 18(E) of the 1974 Constitution, that window was closed and locked. This was clearly and reasonably foreseen by the court in *Capital Drilling,* and applied in *Lowrey* and in the court of appeal below. The result was correct. The decision below is sure footed in a rock bed of jurisprudence and logic; it presents no federal claim. This court therefore has no jurisdiction and the Petition is due to be denied.

CONCLUSION

It is plain that Louisiana did not deprive these taxpayers of any constitutional right, including that of due process. Rather, these Petitioners had a remedy, but simply failed to avail themselves of it.

This Court does not have jurisdiction to now consider this claim, not only because it is totally devoid of merit, but also because Petitioners unexcusably failed to timely raise it below.

Respondent respectfully submits that the Petition is due to be summarily denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all counsel of record in this proceeding by depositing a copy of same, duly addressed to each of them, in the United States Mail, First class, postage prepaid, this 3rd day of February, 1989.

GALEN S. BROWN